Protecting Australia's Whistleblowers

The Federal Roadmap

Griffith UNIVERSITY
Human Rights Law Centre
TRANSPARENCY INTERNATIONAL AUSTRALIA

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The authors acknowledge the Ngunnawal, Yugambeh and Bundjalung peoples on whose unceded land this report was written.

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Introduction

Whistleblowers are a vital part of Australian democracy, playing a crucial role in the integrity and accountability of public and private institutions each and every day.

Australian research confirms it is people within organisations – the officials and employees - who really know what goes on and remain the single most important way in which wrongdoing is brought to light.

At key times, Australia has led the world in legislating whistleblower protections, with impressive support from all political parties. From the early 1990s, Australian states began enacting comprehensive whistleblowing laws for the public sector – second only to the United States.

But now Australia's whistleblower protection laws are falling behind. Among more than 60 countries which now have stand-alone whistleblowing laws, many follow the US, United Kingdom and European Union by providing more effective legal remedies than Australia. In 2019, a Federal Court judge described Australia's landmark federal *Public Interest Disclosure Act* (*PID Act*) as 'technical, obtuse and intractable'.

Despite advances in corporate whistleblowing, Australia's federal public service and many industry sectors including disability and aged care suffer from limited, out of date and inconsistent protections. Complex loopholes in public and private sector laws alike mean whistleblowers are still prosecuted without due regard to the public interest they serve.

Even as Australia takes the historic step of creating the National Anti-Corruption Commission, this highlights big gaps in federal whistleblower protection. Along with better laws for whistleblowers on paper, we need an independent authority to ensure these rights are implemented and enforced in practice. Without trust and confidence in this practical support, the Commission will not be effective. Instead, public and private sector workers will be left exposed for speaking up.

This report sets out 12 key areas of reform needed to place Australia back on the road to international best practice. This is a 'check list', not a 'wish list' – every reform has been identified as necessary by prior reviews, bipartisan parliamentary committees or independent experts.

The reforms span:

- **Effective administration and enforcement** of the laws;
- Ensuring the laws contain consistent, **best practice protections**; and
- Making sure thresholds and limitations in the laws are **workable**.

Importantly, this roadmap highlights the many issues requiring a **consistent fix** across all federal whistleblowing laws – public and private sector – rather than the piecemeal approach which has led to the complex web of gaps and inconsistencies that prevails today.

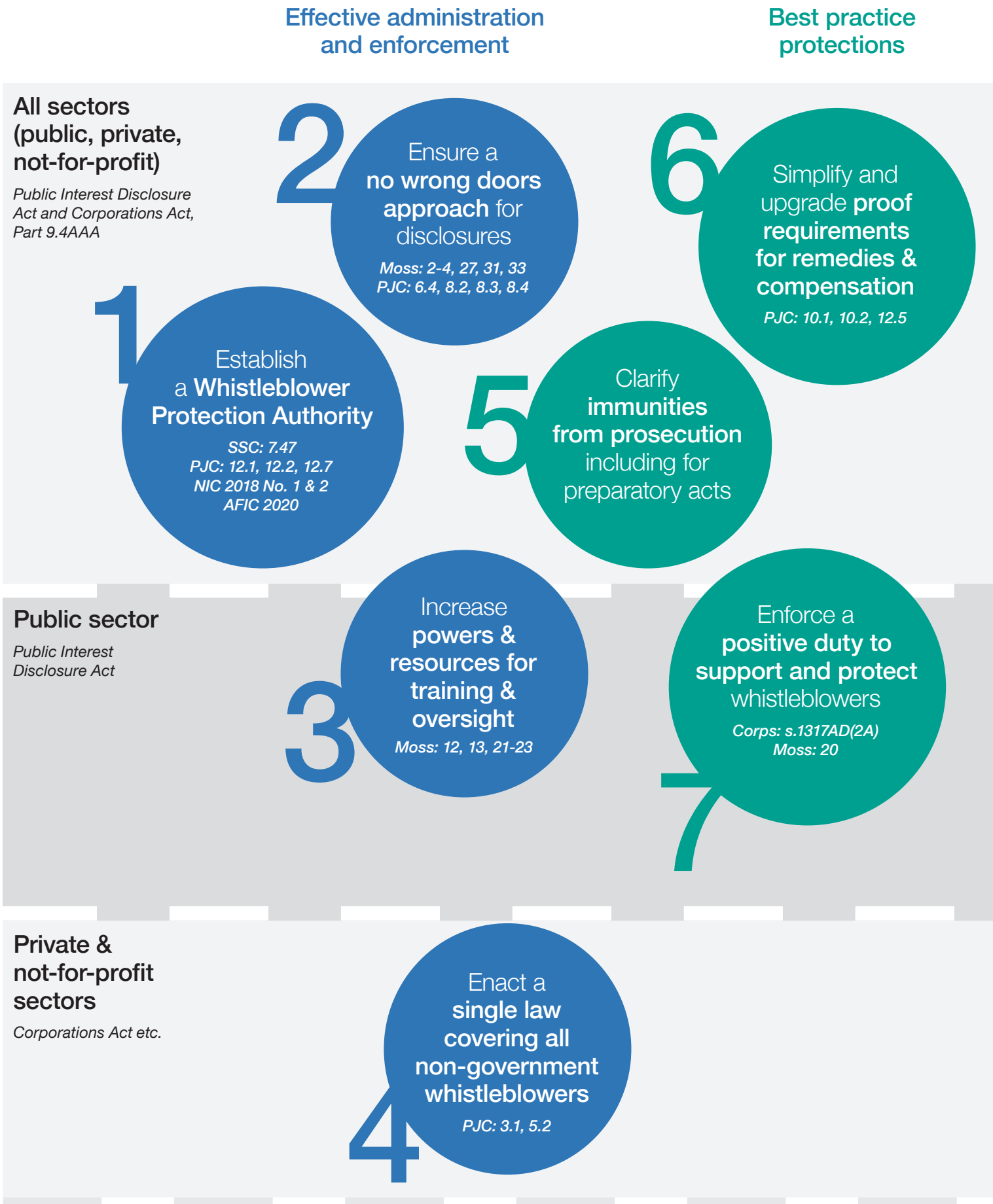
With these reforms, Australia can fix the deficiencies in federal whistleblowing law. Rather than simply talking the talk about this vital pillar of democratic accountability, our parliament can – and must – make whistleblower protections real, for the benefit of all Australians.

Above:

Protests in support of whistleblowers Bernard Collaery and Witness K. Credit: Alex Ellinghausen/ The Sydney Morning Herald

Figure 1:

Protecting Australia's Whistleblowers: The Federal Roadmap


Effective administration and enforcement
Best practice protections
All sectors (public, private, not-for-profit)
Public Interest Disclosure Act and Corporations Act, Part 9.4AAA
2
Ensure a no wrong doors approach for disclosures
Moss: 2-4, 27, 31, 33
PJC: 6.4, 8.2, 8.3, 8.4
6
Simplify and upgrade proof requirements for remedies & compensation
PJC: 10.1, 10.2, 12.5
1
Establish a Whistleblower Protection Authority
SSC: 7.47
PJC: 12.1, 12.2, 12.7
NIC 2018 No. 1 & 2
AFIC 2020
5
Clarify immunities from prosecution including for preparatory acts
Public sector
Public Interest Disclosure Act
3
Increase powers & resources for training & oversight
Moss: 12, 13, 21-23
Enforce a positive duty to support and protect whistleblowers
Corps: s.1317AD(2A)
Moss: 20
7
Private & not-for-profit sectors
Corporations Act etc.
4
Enact a single law covering all non-government whistleblowers
PJC: 3.1, 5.2

Workable thresholds and limitations

8 Ensure **easier, consistent access** to remedies
PJC: 10.3, 12.6

11 Properly **protect public / third-party whistleblowing**
PJC: 3.1, 8.5, 8.6
Moss: 8, 9

Reform Crimes Act, Criminal Code and Evidence Act to protect **public interest journalism and media sources**

9 Enhance **information sharing and ability to access support**
Moss: 16-19, 24, 25
PJC: 7.2, 7.3

10 Expand the **definition of detriment** attracting remedies
PJC: 10.2
Corps: s.1317ADA

12 Exclude **solely individual employment grievances** from PID protections
Moss: 5, 6, 7
PJC: 5.1, 12.3

KEY REFERENCES:

AFIC	Australian Federal Integrity Commission Bill 2020
Corps	Corporations Act 2001, Part 9.4AAA (2019)
Moss	Moss Review PID Act 2016 recommendations
NIC	National Integrity Commission Bills 2018
PID	Public Interest Disclosure
PJC	Parliamentary Joint Committee on Corporations & Financial Services 2017 recommendations
SSC	Senate Select Committee 1994 recommendations

Effective Administration and Enforcement

Right:
Sharon Kelsey blew the whistle on alleged wrongdoing at a Queensland council, where she was the chief executive. She has been locked in legal battles ever since. Credit: GetUp!

Whistleblower protection is complex. Yet there is little institutional support for whistleblowers to navigate the protections available to them. Unlike other areas of workplace law, where the Fair Work Ombudsman or human rights commissions oversee and enforce employment and anti-discrimination rights, whistleblowers are left alone and unsupported. This can and must change, through institutional and practical reforms to make the protections in all whistleblowing laws actually work.

1. Establish a whistleblower protection authority

Establish a whistleblower protection authority to enforce whistleblowing laws, provide practical support and drive the implementation of protections in practice.

Much has been done under current laws to require public bodies and companies to implement protections through their own internal procedures. Agencies like the Commonwealth Ombudsman and Australian Securities and Investments Commission (ASIC) monitor for compliance with best practice policies. However, when internal procedures fail or an organisation turns on a whistleblower, there is no federal agency tasked with independent investigation of detrimental actions or enforcement of the legal protections theoretically afforded by the law.

Research shows that a substantial proportion of whistleblowers suffer serious repercussions for doing so, of whom barely a fraction receive any protection (see 'Key Research Findings', below). This injustice has a chilling effect. At state level, only a handful of criminal prosecutions for reprisal have ever been attempted, and none have succeeded. Among the few claims for remedies or compensation brought under any federal law – including less than a dozen cases under the *PID Act* since 2013 – almost none have been successful.

First proposed by the Senate Select Committee on Public Interest Whistleblowing in 1994, a whistleblower protection authority was unanimously recommended by the landmark inquiry of the Parliamentary Joint Committee on Corporations and Financial Services into whistleblower protections across the corporate, public and not-for-profit sectors (2017). It was also promised by the Australian Labor Party in February 2019, and incorporated in the design of the crossbench's *National Integrity Commission* and *Australian Federal Integrity Commission Bills* in 2018 and 2020.

Transparency International (2018) also recommends an independent enforcement agency as part of national whistleblowing laws. Following the precedent of the US Office of Special Counsel and other North American regulators, the Dutch Whistleblowers Authority (*Huis voor Klokkenluiders*) was established in 2016, with initiatives to establish an Office of the Whistleblower underway in the United Kingdom and elsewhere.

A whistleblower protection authority, whether as a standalone agency or an extension of an existing regulatory institution (such as the National Anti-Corruption Commission) would help implement all federal whistleblowing laws, by:

- Being a source of practical guidance and support for whistleblowers;
- Assisting agencies, companies and regulatory bodies with coordination and management of disclosures (see 'no wrong doors' below);
- Promoting best-practice whistleblowing policies and procedures in collaboration with existing oversight agencies (e.g. the Commonwealth Ombudsman and ASIC);
- Investigating alleged detrimental action and recommending remedies;
- Supporting enforcement litigation in strategic cases where whistleblowers deserve remedies in the Fair Work Commission or federal courts; and
- Administering a rewards scheme for whistleblowers, also unanimously recommended by the 2017 Parliamentary Joint Committee.

For lawyers and other stakeholders to play their role in ensuring whistleblowers can access their rights, specialist independent legal support is also crucial. Whistleblower protections have gained more use in the USA, and elsewhere, in part because a dedicated ecosystem of lawyers has developed to help make the rights real. Through funding for legal support for whistleblowers, as well as an effective rewards scheme, a whistleblower protection authority will encourage 'professionalisation' of whistleblowing supports and help redress the imbalance in power between well-resourced organisations and ordinary workers who speak up.

2. Ensure a ‘no wrong doors’ approach

Create a ‘no wrong doors’ approach through coordinated referral processes and inclusion of all relevant regulatory agencies in the whistleblowing framework.

Effective whistleblower protection requires two central components: confidence that protections apply to any eligible whistleblower who takes their concerns to any authority who is reasonable or logical to approach; and machinery to ensure whistleblowers are not referred to the wrong place (e.g. back to the organisation that may already be mishandling their concern) or fall through the cracks as they shuffle between the jurisdictions of different agencies.

For the federal public sector, the 2016 Review of the *PID Act* (Moss Review) identified many agencies that do or might logically receive whistleblowing complaints – such as the Inspector-General of Taxation, or Australian Public Service Commission – who are not identified as receiving authorities under the law. Similarly, despite being reformed in 2019, the *Corporations Act* whistleblowing provisions do not list logical Commonwealth regulatory agencies such as the Australian Competition and Consumer Commission or Australian Federal Police. Instead, to attract protection, a whistleblowing concern has to be made to just a few agencies, like the Commonwealth Ombudsman or ASIC, who may not be the most likely or appropriate to investigate the information.

Almost every review, including the Senate Select Committee on a National Integrity Commission (2017), has noted the difficulty experienced by whistleblowers in navigating our opaque and complex integrity systems. Whistleblowers are often referred back to their own agency even when this is unwise, or give up after being shunted between different agencies, with damaging delays and impacts for whistleblowers and agencies alike.

A major benefit of a whistleblower protection authority is to force greater coordination and more appropriate processes for referrals of whistleblowing matters. However, existing laws also need to expressly identify all relevant integrity or regulatory agencies to whom whistleblowers are likely, and encouraged, to directly approach, across both public and private sectors.

Effective Administration and Enforcement

3. Provide greater powers and resources for training and oversight

Stronger powers and resourcing for oversight and compliance, including ongoing training and education for staff, supervisors and authorised officers.

The Moss Review identified the need for the oversight agencies for the protections to have clearer powers, a more active role and more resources, as well as to provide a stronger program of training. This applied to the Commonwealth Ombudsman and Inspector-General of Intelligence and Security (IGIS), and the efforts of line agencies to implement their own policies and procedures.

In the private sector, the same remains true for the oversight and compliance roles of ASIC and the Australian Charities and Not-for-profit Commission. Even with a whistleblower protection authority to help enforce protections in specific cases, these general compliance responsibilities remain crucially important across both sectors, for ensuring employers manage disclosures properly in the first place.

Below:

Whistleblowers Brian Hood and James Shelton, who played important parallel roles in bringing Australia's biggest foreign bribery scandal to light.
Credit: Jason South

4. Enact a single law covering all non-public sector whistleblowers

Expand whistleblower protections to cover all Australian private and not-for-profit sector workers, in a consistent way, including removing loopholes in the *Corporations Act* and out-of-date, inconsistent protections in other federal laws.

The *PID Act* provides a strong basis for comprehensive coverage of all Commonwealth public officials and federal government contractors, especially once politicians and their staff are added under proposed improvements to the anti-corruption and parliamentary standards regimes.

By contrast, Australian private and not-for-profit sector organisations are covered by an incomplete and messy patchwork of inconsistent whistleblower protection laws. Amendments to the *Corporations Act* in 2019 tried to roll improved protections for corporate, banking and financial sector whistleblowers into a single, more unified regime. However, at the same time:

- A parallel, duplicate regime was created for taxation whistleblowers;
- Unions are subject to different rules under the *Fair Work (Registered Organisations) Act 2009*;
- The *Aged Care Act 1997* only offers defective whistleblower protections dating from before reform of the *Corporations Act*, renewed in this inconsistent form as recently as 2021 (see Figure 2, pages 10–11, below);
- The same applies to National Disability Insurance Scheme whistleblowers, under defective protections added to that Act in 2017; and
- Other whistleblowers who reveal wrongdoing under federal regulation, but are not corporate employees or in the above sectors, get no protection at all.

Some out-of-date laws, such as those still applying to federal aged care and disability support, do not allow anonymous whistleblowing, impose an ambiguous 'good faith' test for protection, and only allow civil remedies if a criminal reprisal is shown.

The gaps and inconsistencies flowing from multiple laws add significant regulatory complexity – especially for employers subject to more than one law, and federal contractors to whom the different standards of the *PID Act* also apply, some of them higher and some lower. Australia risks going down the path of legislative chaos seen in the US, where as at 2011, private sector whistleblower protections were already duplicated across no less than 47 different laws.

In 2017, the Parliamentary Joint Committee recommended that equivalent protections should be provided for all private and not-for-profit sector whistleblowers, under a single consolidated law. The Committee emphasised the need for consistency between the public and private sectors, wherever logical and possible. In 2019, then shadow Attorney-General Mark Dreyfus KC and Treasury spokesperson Clare O'Neill announced a Labor government would pursue this approach.

The time to do this, to avoid ongoing inconsistencies and 'catch ups' between laws in different sectors, is now – at the same time as federal public sector whistleblower protections are being reformed.

Figure 2:

How Australian whistleblowing remedies compare

KEY:

Grounds for seeking remedies:

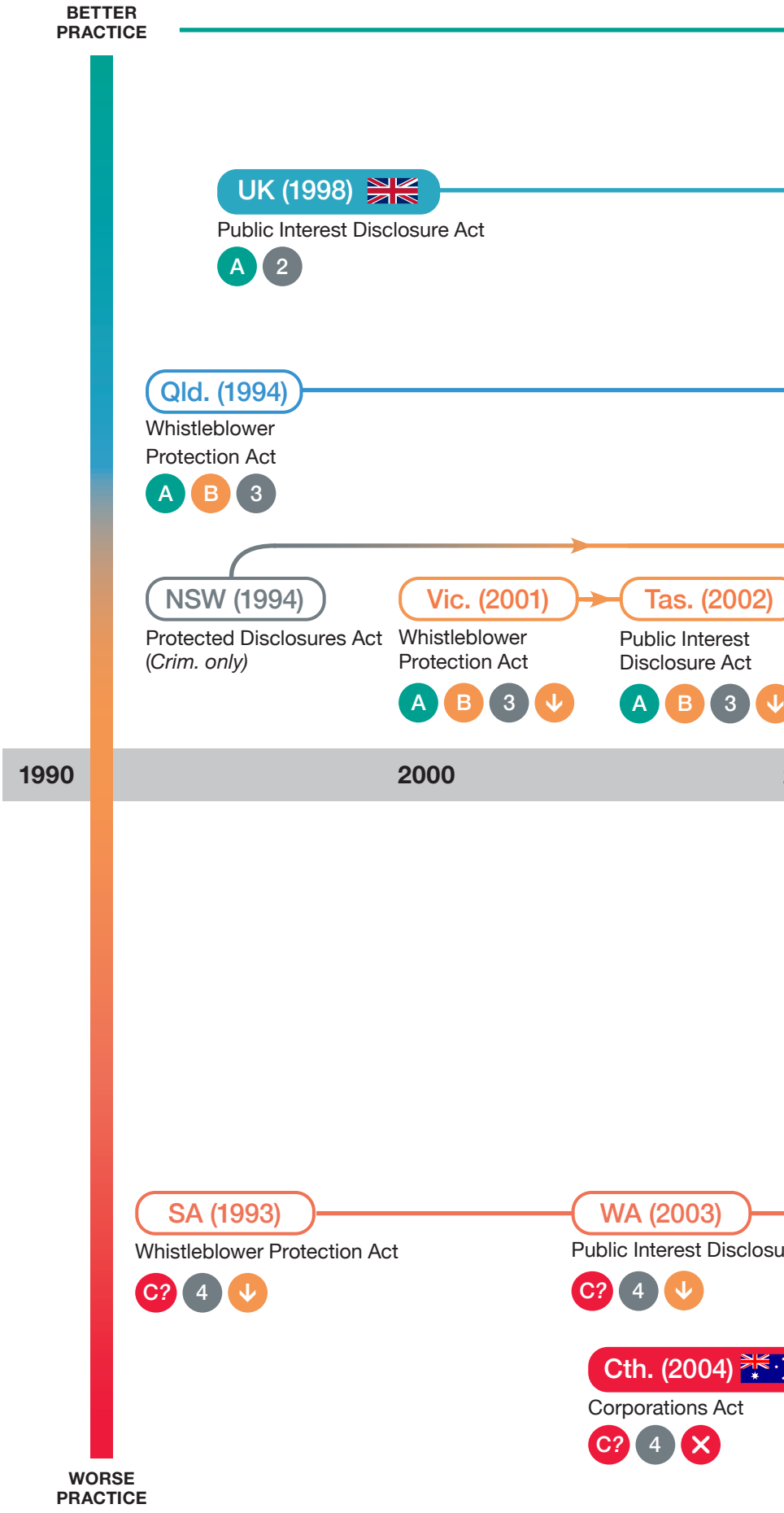
- A — Detriment was 'because' or 'due to the fact of' the disclosure (broad)
- B — Detriment was caused 'in the belief' of a disclosure (subjective element)
- C — 'Reason' for detrimental conduct must be or include the 'belief or suspicion' of the disclosure (subjective element required) (narrow)

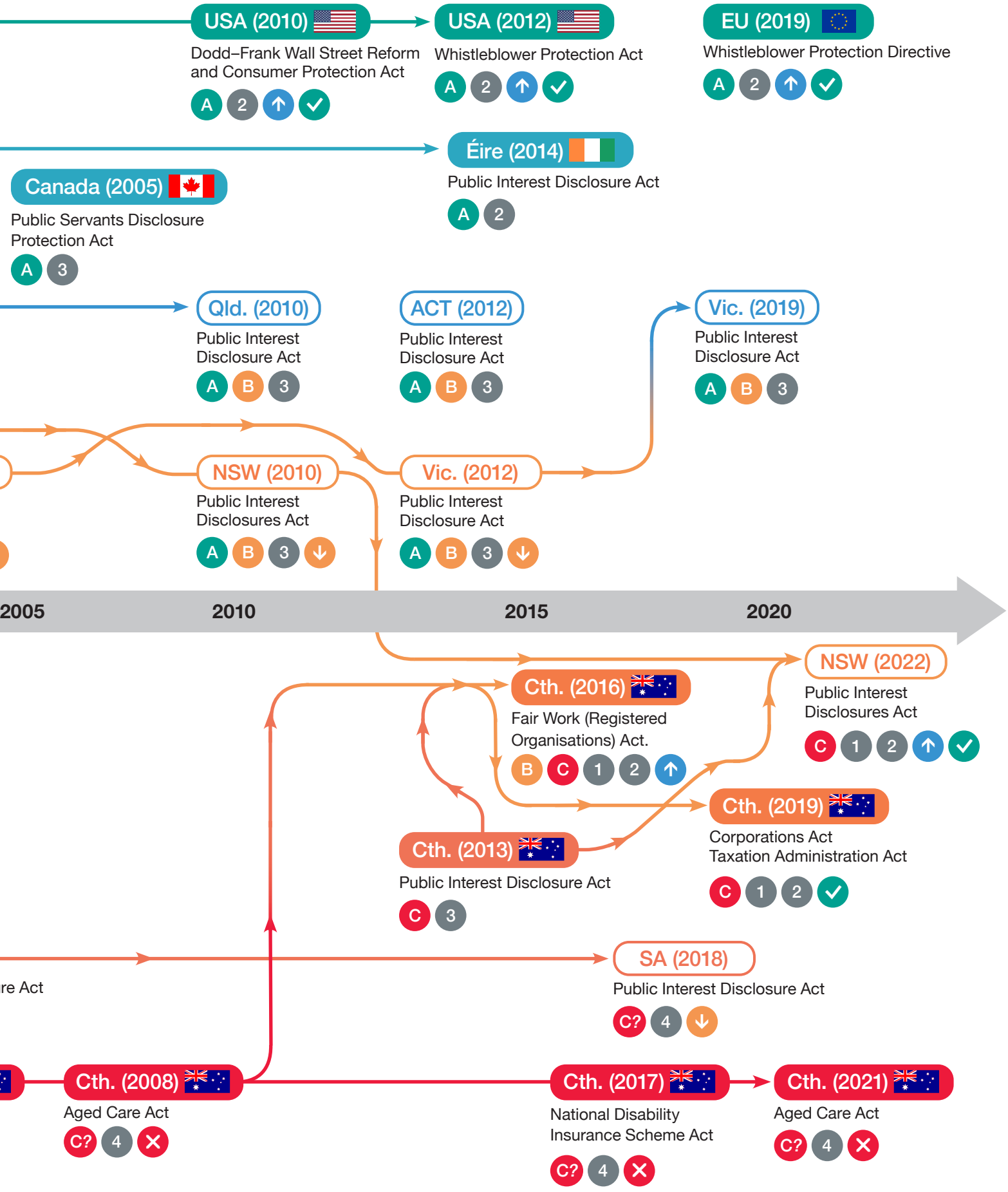
Scope of detriment:

- 1 — Remedies for damage flowing from failure to fulfil a duty to prevent detriment (broad)
- 2 — Remedies for detrimental conduct including acts *and* omissions
- 3 — Remedies for detrimental actions 'taken' due to disclosure (implied direct reprisals only)
- 4 — Remedies for 'victimisation' only

Additional elements:

- ✓ — Burden of proof reverses to respondent
- ↑ — Constructive knowledge allowed for ('should have known')
- ↓ — Disclosure must be at least a 'substantial' reason for the detriment
- ✕ — 'Good faith' required, no anonymity allowed




USA (2010)
Dodd–Frank Wall Street Reform and Consumer Protection Act
A 2
USA (2012)
Whistleblower Protection Act
A 2
EU (2019)
Whistleblower Protection Directive
A 2
Éire (2014)
Public Interest Disclosure Act
A 2
Canada (2005)
Public Servants Disclosure Protection Act
A 3
Qld. (2010)
Public Interest Disclosure Act
A B 3
ACT (2012)
Public Interest Disclosure Act
A B 3
Vic. (2019)
Public Interest Disclosure Act
A B 3
NSW (2010)
Public Interest Disclosures Act
A B 3
Vic. (2012)
Public Interest Disclosure Act
A B 3
2005
2010
2015
2020
NSW (2022)
Public Interest Disclosures Act
C 1 2
Cth. (2016)
Fair Work (Registered Organisations) Act.
B C 1 2
Cth. (2019)
Corporations Act
Taxation Administration Act
C 1 2
Cth. (2013)
Public Interest Disclosure Act
C 3
SA (2018)
Public Interest Disclosure Act
C? 4
Cth. (2008)
Aged Care Act
C? 4
Cth. (2017)
National Disability Insurance Scheme Act
C? 4
Cth. (2021)
Aged Care Act
C? 4

Below:

Tax office whistleblower Richard Boyle attends court in Adelaide. Boyle is being prosecuted for blowing the whistle on unethical debt recovery practices. Credit: AP / David Mariuz.

Quality legal protections lie at the heart of whistleblowing legislation. The second major area of reform is to ensure that when whistleblowers speak up – whether internally, to regulators or to the wider public – these protections are fit for purpose.

5. Clarify immunities from prosecution

Ensure that intended protections against criminal or civil liability cover necessary preparatory actions, and address legal uncertainties arising in whistleblowing cases.

Like most whistleblowing laws, the *PID Act* and *Corporations Act* provide immunity from criminal, civil and administrative liability for disclosures of wrongdoing. However the limited cases to date, especially the Commonwealth's prosecution of Australian Taxation Office whistleblower Richard Boyle, have revealed legal gaps and uncertainties which can drag cases out for years, increasing costs for all parties and defeating the purposes of the protections.

This immunity needs to cover necessary or reasonable actions related to the disclosure – such as accessing or securing relevant information – not just the act of disclosure itself. For example, the European Union's 2019 Whistleblower Protection Directive provides for protection against all but 'self-standing', entirely unrelated offences. In France, Ireland and the United Kingdom, the law protects a whistleblower for 'misappropriating' or concealing documents containing information of which they have lawfully obtained knowledge. In Australia too, this needs to be put beyond doubt.

When whistleblowers seek immunity from a criminal offence, there also needs to be greater certainty whether this question should be heard as a separate civil question or bundled into the criminal trial. This affects multiple issues, including: whether issues should be determined on a balance of probabilities or beyond reasonable doubt; whether federal constitutional rights to a jury trial apply; and how to ensure open justice even though media coverage could impact on a later criminal trial. The *Corporations Act* procedure is even less clear than in the *PID Act*, which reverses the burden of proof in immunity claims (but not compensation claims: see 'simplify proof requirements', below).

6. Simplify and upgrade proof requirements for remedies and compensation

Make civil remedy and compensation rights workable by bringing them into line with international best practice, including reversing the burden of proof.

A fundamental purpose of whistleblowing laws is to ensure that if a whistleblower suffers unjust detriment, this can be remedied through civil or administrative orders, employment remedies like reinstatement or financial compensation for impacts on their career, current and future earnings, personal life or mental health.

This requires free-standing rights to remedies for injustice, irrespective of whether individuals knowingly or recklessly intended any harmful actions – which is the subject of separate criminal 'reprisal' or 'victimisation' offences.

However, **Figure 2** (pages 10–11) shows how Australia's federal proof requirements for accessing civil remedies have fallen behind international standards, as well as many state ones. While there are good aspects to some recent federal laws, such as the *Corporations Act*, these are undermined by the fundamental barrier to remedies unless an individual can be shown to have knowingly undertaken harmful conduct for the 'reason' of the disclosure.

Even when harmful acts are truly direct – say terminating a whistleblower's employment – this level of intent can be almost impossible to prove. But in fact, research shows that most of the suffering experienced by whistleblowers stems from organisational failures to support them, or misguided personnel actions which fail to take the whistleblowing into account – not actions which are knowing or intentional responses to the disclosure itself.

Around 80 per cent of whistleblowers suffer these indirect or 'collateral' forms of damage, despite much of it being predictable and preventable (see Figure 3, 'Key research findings' below). Yet as the research also shows, too few whistleblowers receive meaningful remedies, even when their own managers agree they have suffered serious repercussions and deserve support. Clearly, the rights intended by law have not translated into reality.

International best practice is for wide thresholds for the nexus between a disclosure and any non-criminal detriment flowing from it, which an employer or other party should be required to make good.

For example, following principles set out by the Organisation for Economic Co-operation and Development since 2011, the European Union's 2019 Whistleblower Protection Directive, provides that once a whistleblower has shown *prima facie* that they suffered, the employer can only escape responsibility for compensation by proving its actions were 'based on duly justified grounds'. The burden shifts to those allegedly responsible, to prove that the detrimental acts or omissions were 'not linked in any way' to the act of whistleblowing.

By contrast, Australia's federal laws since 2013 are uniquely restrictive in requiring that a respondent's conscious 'belief or suspicion' of a disclosure must be a positive 'reason' for the detrimental conduct before remedies can flow (*PID Act* s.13, *Corporations Act* s.1317AD). While reasonable for a criminal offence, this basis was identified as too narrow by the 2017 Parliamentary Joint Committee, which recommended separating out the wider grounds for civil remedies and compensation.

Unfortunately, the current restrictive requirements in the federal *PID Act* and *Corporations Act* were also replicated in the anti-reprisal provisions of the *National Anti-Corruption Commission Bill 2022*, rather than this opportunity being taken to begin fixing the problem.

Other problems with Australia's federal laws – and many state ones – include language which presumes unjust damage only flows from positive acts (rather than omissions and failures), and inconsistent burdens of proof. For example, while the *Corporations Act* provides a reverse burden of proof for civil remedies, the *PID Act* (s.23) does not. International best practice also provides clearer thresholds for what an organisation must prove, to escape responsibility.

7. Enforce a positive duty to protect whistleblowers

Promote a culture of supporting and protecting whistleblowers, by making employers liable if they fail to do so.

In 2016, Australia was the first country to make civil remedies available if a whistleblower suffers damage due to someone's failure, in part or whole, to fulfil a duty to 'prevent, refrain from, or take reasonable steps to ensure other persons… prevented or refrained from, any act or omission' likely to be detrimental (*Fair Work (Registered Organisations) Act*, s. 337BB(3)). In 2019, this was extended to all corporate whistleblowers in a narrower form, with remedies available against a company if a third person (e.g. their employee) is shown to have engaged in a detrimental act or omission, and the body failed to fulfil 'a duty to prevent the third person engaging in the detrimental conduct' or take 'reasonable steps' to ensure the third person did not do so (*Corporations Act*, s. 1317AD(2A)).

In 2022, the NSW *Public Interest Disclosures Act* was amended to make public agencies liable if they fail in their duty to 'assess and minimise the risk of detrimental action' against a person as a result of a disclosure. Importantly, an agency is deemed to be under that duty if a disclosure officer for the agency is either aware 'or ought reasonably to be aware' that a disclosure has been made (ss. 61,62).

These historic provisions recognise that whistleblower protection relies on organisations implementing their own responsibilities to support whistleblowers and prevent or limit any damage in the first place. A similar basis for civil remedies also needs to be added to the federal *PID Act* – in the form of a new streamlined provision, also applied to the *Corporations Act*, to clearly recognise an enforceable organisational duty to protect whistleblowers from preventable indirect and collateral damage, not simply direct reprisals.

8. Ensure easier, consistent access to remedies

Vest the Fair Work Commission with new jurisdiction to conciliate whistleblowing claims against employers, in both public and private sectors.

Another reason why civil remedies have not flowed under federal laws is the difficulty in accessing federal courts – the primary avenue provided by the *PID Act*, and only avenue under the *Corporations Act*. As courts of law, federal courts have strict rules of evidence, expensive filing fees, and limited scope to help whistleblowers who represent themselves. Access to federal courts at any stage is vital on questions of law, to obtain binding orders, or to award remedies against a non-employer. But in most cases, whistleblowers who seek legal remedies need a more suitable independent tribunal.

For federal public servants, the *PID Act* also makes whistleblowing a workplace right, allowing them to seek general protections under the *Fair Work Act 2009*. However, the special considerations and safeguards of the *PID Act* do not 'carry-over' to *Fair Work* proceedings. This may include protections against adverse costs, but more importantly, includes the risk that detrimental acts against whistleblowers will be treated like a mere workplace dispute, rather than being seen as a threat to public integrity and accountability itself. A conventional industrial relations approach can cause problems, as seen in Queensland and the United Kingdom.

The Fair Work Commission needs to be given its own jurisdiction to hear whistleblower protection claims, taking these special considerations into account. With proper resourcing and expertise, the FWC can significantly improve access to justice for whistleblowers as well as quicker resolution for employers, whether a new whistleblower protection authority is involved or not. Where conciliation is unsuccessful or arbitration by consent is refused, or orders are not constitutionally available, proceedings could still be commenced in the federal courts.

Private sector whistleblowers also deserve the same ease of access to remedies. In addition, the *Corporations Act* requires amendment to ensure the new protections enacted in 2019 are available to all corporate whistleblowers, fixing a loophole arising from the Federal Court's decision in *Alexiou v Australia and New Zealand Banking Group Limited* (2020).

Left:

Jacinta O'Leary was a nurse and midwife at offshore immigration detention facilities in Nauru, where she helped raise concerns about the failure to provide appropriate medical care to detainees. Credit: GetUp!

Right:

Former Commonwealth Bank of Australia whistleblower Jeff Morris, who helped trigger numerous parliamentary inquiries and the Royal Commission into Banking Misconduct. Credit: AP / Joel Carrett

9. Enhance information-sharing and ability to access support

Amend confidentiality requirements to make it easier for agencies, employers and oversight bodies to properly respond to whistleblowing cases, and for unions and professionals to provide support and representation.

Strict confidentiality is a cornerstone of whistleblower protection. To the maximum possible extent, the content of disclosures or identity (or even the fact) of a whistleblower should only be shared with those who need to know. However, both the 2016 Moss Review of the *PID Act* and the 2017 Parliamentary Joint Committee found that existing confidentiality requirements were often too inflexible.

Most importantly, while whistleblowers can reveal the content of a disclosure to lawyers in order to seek legal advice, neither the *PID Act* nor *Corporations Act* permit a whistleblower to reveal the information to others on whom they depend for advice, help and support – such as unions, health professionals or even immediate family. Little surprise, then, that a survey by the Moss Review found that 72% of federal government whistleblowers felt unsupported during the process. By contrast, a report commissioned by Public Services International in 2016 shows the vital role unions should be able to play in providing support.

Secrecy requirements also need to be made flexible enough that agencies can share information internally and externally to ensure disclosures are properly and speedily addressed. If the fact or identity of a whistleblower is already known in an organisation, attempting to enforce secrecy can be not only impossible, but get in the way of the information sharing needed to provide whistleblowers with effective support.

Where necessary, federal laws need to be clearer that the purposes of confidentiality are to safeguard due process and protect whistleblower welfare, including by requiring whistleblowers' consent to how information about them is shared – not to create cumbersome administrative burdens or throw an extra blanket of secrecy over the wrongdoing that is suspected to have occurred.

10. Expand the definition of detriment

Expand the *PID Act* definition of detriment to include non-employment impacts.

In 2016 and 2019, respectively, union and corporate whistleblowers got the benefit of an expanded definition of the 'detriment' for which they could seek remedies – including any damage to property, reputation or their financial position, and any form of discrimination, harassment, intimidation or other harm (including psychological harm) – whether by their employer or any other person (*Fair Work (Registered Organisations) Act*, s.337BA(2); *Corporations Act*, s.1317ADA).

For public sector whistleblowers, section 13 of the *PID Act* continues to give official work-related or employment actions as the only examples of 'disadvantage' amounting to detriment – such as dismissal, injury of an employee in their employment, alteration of an employee's duties to their detriment, and discrimination in employment. This implies remedies might only be available for official or authorised workplace decisions, rather than a full spectrum of potential reprisals and collateral damage. This definition needs to be expanded, as recommended by the 2017 Parliamentary Joint Committee.

Workable Thresholds and Limitations

Not every complaint constitutes public interest whistleblowing. Nor do all public disclosures of confidential information, if they lack a public interest justification. Two major reforms are needed to ensure protections are available when they are needed, and not when they aren't.

11. Properly protect public and third-party whistleblowing

Recognise the importance of whistleblowers speaking up publicly in appropriate circumstances, by making external and emergency disclosure provisions simpler and more consistent, including to cover national security whistleblowers.

Like other comprehensive whistleblowing laws, the *PID Act* and *Corporations Act* extend to whistleblowers who go public. This recognises that disclosure to the media, parliamentarians and other third parties can be a critical safety-valve, if there are no safe internal avenues or if these fail.

However, the current laws are unhelpfully complex and inconsistent with one another, on when external disclosure is deemed reasonable. This has led to uncertainty, confusion, and cost to public confidence in the transparency and accountability of government and business – including a chilling effect on all other reporting. Huge damage to Australia's reputation has been caused by recent criminal prosecutions of three federal whistleblowers for taking their disclosures outside official channels: Witness K who revealed unethical commercial espionage against Timor-Leste, ATO whistleblower Richard Boyle, and Afghanistan veteran and Army lawyer, David McBride.

In 2020, the Parliamentary Joint Committee on Intelligence and Security recommended simplifying the public interest test for federal government whistleblowers. Currently the *PID Act* imposes an objective test that a third-party disclosure must not be contrary to the public interest, with a long list of messy criteria. A simpler test, building on provisions already found in Queensland, the ACT, the United Kingdom and Ireland, is whether further disclosure is reasonable in all the circumstances to ensure wrongdoing is effectively addressed, given that revealing wrongdoing is already inherently in the public interest.

Below:
David McBride outside the ACT Supreme Court. McBride, a former Army lawyer, is alleged to have blown the whistle on Australia's alleged war crimes in Afghanistan. His trial is ongoing. Credit: AAP / Rod McGuirk

For public sector protections to work, the blanket ban must end on third party disclosure of any information that 'has originated with, or has been received from, an intelligence agency' (*PID Act*, s. 41(1)(a)). More reasonable tests under other laws, including the National Anti-Corruption Commission legislation, restrict disclosure only where there is an objective risk of actual harm to security, personnel or the national interest.

The current *PID Act* test, by contrast, allows wrongdoing to be hidden even if the information poses no security or intelligence risk, and whistleblowers to be prosecuted even if the same information is already available from other sources. As a consequence, whistleblowers like Witness K or David McBride have been left without any right to even assert a public interest defence.

Even more confusingly, the *Corporations Act* approaches the test differently – requiring the whistleblower to have a reasonable belief that there is a further public interest in public disclosure. It also includes unworkable tests for the whistleblower to first notify authorities that they intend to go public, increasing the risk of detrimental outcomes. Meanwhile, whistleblowing provisions in other laws such as the *Aged Care Act* and *National Disability Insurance Scheme Act* provide no protection for public or third-party disclosure, at all.

Left:

Australian Federal Police officers execute their 'Afghan Files' raid on the ABC's Sydney headquarters in 2019. Credit: ABC News.

Two sides of the public interest coin: protecting whistleblowing through stronger press freedom

Whistleblower protections do not operate in a vacuum. When whistleblowers go public, their role as public interest media sources also needs protection, as does press freedom itself, as a pillar of transparency and accountability across government and business.

Since Australian Federal Police raids on the ABC and News Corporation in 2019, Australia has fallen sharply on international press freedom rankings. While criminal offences for disclosure have multiplied, recommendations for law reform to balance secrecy and transparency under Australia's federal laws have so far gone unaddressed. These include a major inquiry by the Australian Law Reform Commission (2010), and reports by the Parliamentary Joint Committee on Intelligence and Security (August 2020) and Senate Standing Committee on Environment and Communications (May 2021).

Whistleblower protections will remain incomplete until Australia creates a general public interest defence for citizens, whistleblowers and journalists to call on when necessary against this rising tide of potential liability.

Since 2011, journalism 'shield laws' have strengthened the right of journalists not to identify their sources in legal proceedings, protecting whistleblowers from exposure and journalists from conviction for contempt. However, these laws have proved too weak, with media still exposed to prosecution simply for receiving confidential information as part of their job, and search warrant powers that can force identification of sources irrespective of what happens in court.

Under proposed reforms, search warrants could only be issued, or charges laid after 'due regard' is given to the public interest in journalism and the protection of confidential sources. But these reforms would not go far enough. For the role of whistleblowing to be fully respected, stronger shield laws should bring a higher level of privilege, so such warrants could not be issued at all, nor criminal charges brought, without clear evidence of wrongdoing by journalists outside their public interest reporting roles.

12. Exclude solely individual employment grievances

Strengthen PID Act implementation by making clear that purely individual workplace grievances do not trigger whistleblower protections.

The 2016 Moss Review of the *PID Act* recommended that the scope of 'disclosable conduct' no longer include allegations of maladministration or unlawful conduct which are 'solely about personal employment-related grievances, except when the disclosure indicates systemic wrongdoing or reprisal'. This reform would ensure the whistleblowing regime does not become bogged down and discredited, through its attempted use to resolve workplace grievances – for which it was not designed, and for which other processes exist.

Most state laws already limit the scope for whistleblower protections to be triggered by such matters. Overseas, laws such as the UK's *Public Interest Disclosure Act* have also been amended to make this clear. Under the *Corporations Act* (s. 1317AADA), employment grievances 'having (or tending to have) implications for the discloser personally' are not protected unless they involve 'significant implications… that do not relate to the discloser', a breach of federal laws, a danger to the public or the financial system, or issues of detrimental conduct.

Any employment carve out must be framed with care to ensure that legitimate whistleblowing does not fall through the cracks. The *Whistling While They Work 2* research revealed that almost half of all whistleblowing involves a mixture of workplace and public interest concerns, along with the fifth involving solely public interest concerns, as against a third involving only personal or workplace grievances. Already, *PID Act* protections do not apply to complaints relating 'only' to government policies or decisions 'with which a person disagrees'. But protections still apply to such disagreements, and should still apply even to workplace grievances, in the many cases where these also involve, or contain, information pointing to other wrongdoing.

Key Research Findings

Australia has been home to some of the world's largest studies into public interest whistleblowing. In 2008, the Australian Research Council-funded *Whistling While They Work* project surveyed over 7,000 employees from 118 public sector agencies, including 1500 whistleblowers. Cited heavily by the House of Representatives Standing Committee inquiry which recommended the *Public Interest Disclosure Act*, the research found that while not all whistleblowers suffer, at least a quarter were mistreated by their organisation, with stresses and failures affecting many more.

A decade later, Griffith University's *Whistling While They Work 2* project was the first to compare whistleblowing outcomes in public and private sector bodies. Supported by the Commonwealth Ombudsman, Australian Securities and Investments Commission (ASIC) and integrity and anti-corruption bodies from throughout Australia, it surveyed over 17,000 employees from 46 organisations, including 5,500 whistleblowers and 3,500 managers and governance staff who observed or dealt with whistleblowing cases. The project reaffirmed the crucial role of whistleblowing for integrity and good governance across all types of organisations, but found no improvement in the outcomes for public sector whistleblowers.

Crucially, according to the managers and governance staff, 56 per cent of public interest whistleblowers suffered serious repercussions – whether as indirect/collateral damage, or in 30 per cent of cases, as direct harm including adverse employment actions, harassment or intimidation. This was despite the fact that in over 90 per cent of cases, managers and governance staff assessed the whistleblower as being correct and deserving of the organisation's support.

However, as shown in **Figure 3**, only half (49 per cent) of these whistleblowers were identified as having received any remedy for the detriment they suffered – even marginal or insufficient remedies – despite its seriousness. Even fewer (43 per cent) of those who suffered serious direct harm received any remedy. Overall, less than six per cent received any compensation for the employment, health or personal impacts.

The low proportion of meaningful remedies for whistleblowers, even when managers identify that they suffered serious repercussions and deserved support, shows clearly that the rights intended by law were not translating into reality.

Figure 3:

The current whistleblowing experience: detriment vs remedy

Source: A J Brown & Jane Olsen, 'How well have Australian whistleblowing laws worked to date? Repercussions and remedies for Australasian whistleblowers', 3rd Australian National Whistleblowing Symposium, 11 November 2021. Data source: Whistling While They Work 2 ARC Linkage Project (2016-2019), Integrity@WERQ Survey. Manager and governance respondents from 33 Australian and New Zealand organisations with 5+% response rates (n=2672), describing repercussions and remedies where known for the most significant whistleblowing case dealt with or observed by them (n=1322) and assessed to be (a) not solely a personal or workplace grievance, (b) correct and (c) deserving of the organisation's support (n=646). See www.whistlingwhiletheywork.edu.au.

Of 646 public interest whistleblowers:

56% experienced serious levels of detriment – including

29% who experienced serious direct damage

6% of the 56% received any compensation

48% received no remedy at all

Types of detriment experienced:

Collateral damage

	NUMBER OF WHISTLEBLOWERS:	% WHO RECEIVED NO REMEDY:
Stress arising from the wrongdoing or reporting process:	327	48.9%
Reductions in work performance, due to time and disruption:	192	46.4%
Isolation or ostracism in day-to-day dealings with colleagues:	133	52.6%

Examples of direct damage

	NUMBER OF WHISTLEBLOWERS:	% WHO RECEIVED NO REMEDY:
Harassment, intimidation or harm from colleagues or managers:	122	62.3%
Denial of promotions, bonuses or training opportunities:	84	58.3%
Less desirable duties or locations, demotion, or suspension:	70	47.1%
Dismissal from job:	39	56.4%
Disciplinary or legal action against the whistleblower:	23	56.5%

Types of remedy received:

- Compensation for employment, personal or health impacts
- Revised work duties, legal or counselling support, or relocation
- Apology or management action taken against colleagues
- No remedy received
- Unknown

References and Further Reading

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Figure 4:

Protecting Australia's Whistleblowers – Checklist (Updated)

This table provides a breakdown of what proposed or completed federal reforms would achieve, in relation to this roadmap, since first published in November 2022. As at June 2023, the items marked as on track to be achieved (partly, substantially or wholly) reflect the reforms contained in the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth).

		Sector(s)	
		Public	Private and Not-for-profit
Effective Administration and Enforcement			
1.	Establish a whistleblower protection authority	■	■
2.	Ensure a 'no wrong doors' approach	☑	■
3.	Increase powers and resources for training and oversight	☑	■
4.	Enact a single law covering all non-public sector whistleblowers		■
Best Practice Protections			
5.	Clarify immunities from prosecution	■	■
6.	Simplify proof requirements for remedies and compensation	■	■
7.	Enforce a positive duty to support and protect whistleblowers	■	■
8.	Ensure easier, consistent access to remedies	■	■
9.	Enhance information-sharing and ability to access support	☑	■
10.	Expand the definition of detriment	☑	
Workable Thresholds and Limitations			
11.	Properly protect public and third party whistleblowing	■	■
12.	Exclude solely individual employment grievances	☑	

Status

☑ Partially

☑ Substantially/wholly

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